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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/762,074	01/20/2004	Darren Traub	700065.4001	4587
34313 7590 03/01/2007 ORRICK, HERRINGTON & SUTCLIFFE, LLP IP PROSECUTION DEPARTMENT 4 PARK PLAZA SUITE 1600 IRVINE, CA 92614-2558			EXAMINER GILBERT, WILLIAM V	
			ART UNIT 3635	PAPER NUMBER
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
3 MONTHS		03/01/2007	PAPER	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

**Office Action Summary**

Application No.

10/762,074

Applicant(s)

TRAUB ET AL.

Examiner

William V. Gilbert

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 18 February 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-20 and 32-42 is/are pending in the application.
- 4a) Of the above claim(s) 3,4,10,15-20,33-35,37,40 and 42 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2,5-9,11-14,32,36,38,39 and 41 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 20 January 2004 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_.

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#### DETAILED ACTION

This is a First Action on the Merits. Applicant cancelled Claims 21-31 in response dated 18 February 2007. Claims 1-20 and 32-42 are pending.

#### *Election/Restrictions*

1. Applicant's election without traverse of **Claims 1, 2, 5-9, 11-14, 32, 36, 38, 39 and 41** in the reply filed on 18 February 2007 is acknowledged. In Applicant's reply, Applicant elected Species I, which corresponded to Figures 1 and 2. Applicant did not elect corresponding claims, however, so the Examiner examined the claims that correspond to the elected species. The corresponding claims are 1, 2, 5-9, 11-14, 32, 36, 38, 39 and 41.

#### *Drawings*

2. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the **"height of the edge board channel is greater than the height of the edging board"** Claim 11, line 3 must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

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Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

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**Claim Rejections - 35 USC § 102**

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

**Claims 1, 2, 11 and 32** are rejected under 35 U.S.C. 102(b) as being anticipated by Marino (U.S. Patent No. 6,202,367).

Claim 1: Marino discloses a stake system (Fig. 2) comprising a stake member (Fig. 3: 21) having a tapered lower region, an upper region (10) having a first channel (8) formed for receiving a first portion of the edging board, and an intermediate region (22) between the upper and lower regions, a hammer cap (20, 42) having a first region having a striking surface (42) and a second region (8) having a second channel (8) for receiving a second portion of the edging.

Claim 2: the intermediate region (22) has a center supporting rib (22).

Claim 11: the first and second channels (8) form an edging board channel when the hammer cap is coupled to the upper end of

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the stake and the height of the channel (Fig. 5: 8) is greater than the landscape edging board.

Claim 32: Marino discloses a stake system (Fig. 3) with a stake having a first recess (31) and a cap (29) having a second recess (11) where the first and second recesses coextensively form a channel.

Claims 36, 38, 39 and 41 are rejected under 35 U.S.C. 102(b) as being anticipated by Chiodo (U.S. Patent No. 5,575,130).

Claim 36: Chiodo discloses a stake having a lower region (Fig 3: 42), an intermediate region (just above 42) that is tapered and an upper region with two vertical tabs (70).

Claim 38: the tabs a have a plurality of horizontal grooves dimensioned to receive the head of a fastener (66).

Claim 39: the grooves (22) define apertures.

Claim 41: the intermediate and lower regions comprise a continuous taper.

***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

**Claims 1, 5-9 and 12-14** are rejected under 35 U.S.C. 103(a) as being unpatentable over Chiodo in view of Harding (U.S. Patent No. 5,256,006).

Claim 1: Chiodo discloses a landscape stake system (Fig. 3) having a stake member with a tapered lower region (42), an upper region (28) with a first channel (60) formed for receiving edging board and an intermediate region (region above 42). Chiodo does not disclose a hammer cap for driving the stake into the ground. Harding discloses a stake (Fig. 1: 10a) with a hammer cap (15) having a striking portion (17) and a channel

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(portion covering stake). It would have been obvious at the time the invention was made to a person having ordinary skill in the art to use a hammer cap in Harding with the stake system in Chiodo in order to prevent damage to the stake while driving it into the ground. The phrase "for receiving a landscape edging board", line 1 is a statement of intended use of the claimed invention and must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

Claim 5: the upper region has two vertical tabs (Chiodo Fig. 3: 70).

Claim 6: the vertical tabs have a plurality of grooves (62).

Claim 7: the tabs (62) are capable of receiving the head of a fastener.

Claim 8: the tabs have apertures (30).

Claim 9: the intermediate region (above 42) is tapered.

Claim 12: the first region (17) is wider than the second region (Harding Fig. 2: 11).

Claim 13: the intermediate region forms a continuous taper (Chiodo: Fig 3).

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Claim 14: the hammer cap in Harding is configured to receive the upper region of the stake member.

### **Conclusion**

5. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Russo (U.S. Patent No. 3,891,189); Bowers (U.S. Patent No. 5,097,912); Allen (U.S. Publication 2002/0104260); Kontz, Jr. (U.S. Patent No. 4,823,521).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to William V. Gilbert whose telephone number is 571.272.9055. The examiner can normally be reached on Monday - Friday, 08:00 to 17:00 EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Carl Friedman can be reached on 571.272.6842. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

WVG 27 Feb 07  
27 Feb 07  
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